United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1060

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ORLANDO DIAZ,

Defendant-Appellant.

Docket No. 77-1060

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- ORLANDO DIAZ, Defendant-Appellant.	Docket No. 77-1060

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Government's failure to disclose whether pretrial photographic identification procedures had been used to identify appellant requires that a hearing be held to determine that question.

2. Whether the district judge's supplemental charge to the jurors had the cumulative effect of impermissibly pressuring them to reach a verdict.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant) rendered on January 21, 1977, after a jury trial, convicting appellant Orlando Diaz of conspiring to distribute and to possess with intent to distribute cocaine (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846) (Count One), and of the actual possession and distribution of that substance (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A); 18 U.S.C. §2) (Count Three). Appellant Diaz was sentenced to four years' imprisonment on each count, the sentences to be served concurrently, and to three years' special parole.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment[1] and First Trial

On June 25, 1976, an indictment was filed charging appel-

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[1]The indictment appears as "B" to the separate appendix to appellant's brief.

lant Diaz and three others[2] with crimes occurring during June 1974.[3] Count One charged that on or about June 27, 1974, appellant Diaz conspired to distribute cocaine, while Count Three[4] alleged that on June 28, 1974, appellant Diaz, Luis Valerio, and two other persons actually distributed and possessed with intent to distribute that drug.

By notice of motion dated August 10, 1976, appellant moved for a hearing "regarding the procedures used to identify Orlando Diaz." Document #3 to the Record on Appeal. Citing United States v. Wade, 338 U.S. 218 (1967), and its progeny, appellant contended that an identification hearing was especially critical in this case in light of the two-year lapse between appellant's arrest and indictment and the crimes charged. Trial counsel's supporting affidavit concluded:

> Considering the long delay between the events and the arrest, and the consequent possibility of misidentification, a hearing should be held to determine under what circumstances the identification was made.
>
> Record on Appeal, Document #3.

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[2]The indictment identified these persons as Louis Valerio, John Doe, a/k/a "Felix", and John Doe, a/k/a "Felix' brother". Appellant Diaz was tried separately.

[3]On the basis of a complaint filed on July 14, 1975, appellant Diaz was arrested on March 15, 1976, almost two years after the events in question.

[4]Count Two of the indictment charged that on June 28, 1976, co-defendant Valerio violated the narcotics laws.

The Government opposed the motion, arguing that Wade and other related cases were inapplicable, since no line-up or photographs had been used in the pretrial investigation. In a sworn affidavit dated August 18, 1976, the Assistant United States Attorney stated:

> With respect to the identification of Diaz, no line-up was conducted during the investigation of this case. Nor was a photographic spread used. As such, United States v. Wade, 338 U.S. 218 (1967, and its progeny are entirely inapposite.

Record on Appeal, Document #5.

On September 13, 1976, Judge Tenney denied the motion "as frivolous." (See endorsement decision, Record on Appeal, Document #3.)

The trial commenced on October 20, 1976. Two days later, on October 22, 1976, the jurors, after extensive deliberations, were unable to reach a verdict, and a mistrial was declared.[5]

B. The Retrial

The case was reassigned to Judge Brieant, and the retrial began on December 7, 1976. The Government's theory was that on June 28, 1974, appellant participated in a sale of cocaine to undercover New York City police officer Frank Marrero, while the defense contended that Officer Marrero and the Government's

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[5]During the course of the jurors' deliberations, Judge Tenney read to them an Allen charge, reproduced as Document #10 to the Record on Appeal.

other witnesses had identified the wrong man (T.15-16[6]).

Marrero testified that at approximately 8:00 p.m. on June 28, 1974, pursuant to prior arrangements made with co-defendant Valerio, the officer went to the Mona Lisa Club ("Mona Lisa") to purchase four ounces of cocaine (T.25, 65). At the club, after co-defendant Valerio introduced Marrero to co-defendant Felix, Felix gave the officer an ounce of cocaine, explaining that the remainder of the drugs would be transferred at Felix' apartment at 42 Sickle Street (T.25-26, 66).

Felix then left the Mona Lisa, driving a green Ford station wagon. Officer Marrero testified that the station wagon's New York State license plate number was 699XIC. Marrero, in his own car, drove Valerio to 42 Sickle Street, where he double-parked behind the green station wagon (T.26-27, 67-68, 69). Co-defendant Valerio then got out of Marrero's car and had a brief conversation with a man standing in front of the building. That man, who, according to Marrero, was appellant Diaz (T.29), got into the station wagon and drove away (T.27, 70-71).

Marrero and Valerio then went into Apartment 2-E (T.29), staying there a few minutes before going to a nearby bar. Returning to the building, the police officer went back to the

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[6]Numerals in parentheses preceded by "T" refer to pages of the transcript of the retrial.

apartment (T.72). Marrero testified that once inside the apartment, he saw appellant hand a plastic bag containing cocaine to Felix who, in turn, handed the package to the officer (T.33, 72). Marrero paid for the drugs and, after a short conversation, left the apartment (T.34-35).

On cross-examination, Marrero testified that he had never seen appellant prior to June 28, 1974 (T.74). When asked when he next saw appellant, the officer stated:

> I saw a picture of him the following day.
>
> (T.76).

Judge Brieant immediately ordered this answer stricken. The police officer then stated that he subsequently saw appellant Diaz almost two years after the crime on March 15, 1976, the date of the arrest. Marrero did not explain the delay in effecting the arrest.

New York City Detective Kieran, who arrested appellant (T. 142), confirmed portions of Marrero's testimony, stating that he saw Felix driving a 1971 Ford station wagon with license number 699XIC (T.98, 132). However, on cross-examination, Kieran admitted that he had previously reported that the car was a sedan (T.135).[7] According to the detective, later that

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[7]The report, dated October 8, 1975, was admitted in evidence (T.148). Kieran stated that he had read the report before he signed it, but further testified that the report was incorrect (T.134).

evening, he saw appellant for 20-30 seconds in front of 42 Sickle Street, talking to an unidentified male (T.100-101, 125, 132, 138).[8]

New York City police officer Robert Bisbee testified as part of the defendant's case. He stated that on June 28, 1977, he was a member of Agent Marrero's back-up "surveillance" team (T.184). Bisbee testified that, as a result of radio communication with the New York State Department of Motor Vehicles on the night of the incident, he learned that the registered owner of the car bearing license plate 699XIC was Orlando Diaz (T.187-188).

On cross-examination, the Assistant United States Attorney asked Officer Bisbee whether he had made "a subsequent investigation regarding the identity of the defendant" (T.209). After a defense objection was sustained, a sidebar ensued. The Assistant United States Attorney then indicated that after June 28,

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[8]Out of the jurors' presence, during a discussion as to a stipulation, the accuracy of a New York State motor vehicle report admitted in evidence was questioned by both the district judge and defense counsel. Assistant United States Attorney Duhamel indicated that the information on the report had been confirmed by further investigation. The prosecutor stated that "a check was made through BCI ... which resulted in the photographs of [appellant] which were identified by Officer Marrero, the undercover agent" (T.167).

The following day, the Assistant United States Attorney informed trial counsel and the district court that, pursuant to the prior discussion, he had questioned employees of the New York State Department of Motor Vehicles, and that they had reported that the 1971 Ford car registered to Orlando Diaz in June 1974 was, in fact, a four-door sedan, not a station wagon (T.177).

1974, the police officers made further investigations "through BCI" (T.210). Judge Brieant again ruled that the testimony was inadmissible.[9]

C. The Charge[10]

The district court instructed the jurors that the Government was required to prove the identification of the defendant beyond a reasonable doubt, and told them how to evaluate the identification testimony (T.279-281). Out of the jurors' presence, in the course of discussing additional instructions on the identification question, the following colloquy then occurred:

> MR. DUHAMEL [the Assistant U.S. Attorney][11]: If I may add one thing, too. It lends itself to a very awkward situation, too, of trying to -- talking about lapse of time, is it lapse from the instance to now, from the instance of the arrest, from the instance of the prior trial which Mr. Joy [defense counsel] continues to refer to --
>
> THE COURT: The record doesn't show that they identified him at the prior trial.
>
> MR. DUHAMEL: I don't think there should be any reference to the prior trial at all.
>
> MR. JOY: It's been two and a half years now.

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[9]Bisbee also testified that on June 28, 1974, he saw appellant with Officer Marrero (T.215).

[10]The complete charge is annexed as "C" to the separate appendix to appellant's brief.

[11]Mr. Duhamel, who tried this case for the Government, did not represent the Government at appellant's first trial.

That certainly is a large factor --

THE COURT: I don't think there is a real identification problem in this case, really.

MR. DUHAMEL: Unless the Court would like to get in also the mug shots they identified --

THE COURT: Oh, no.

(T.312-313).

The jurors deliberated during the afternoon of December 9, 1976, and the morning of the following day. At 2:45 p.m. on December 10, 1976, the district court received a note that read:

> We seem to be unable to make a decision on this case.

(T.328).

In response, Judge Brieant stated that he would read a modified Allen charge to the jurors. Defense counsel submitted to the judge the version of the Allen charge which had been used at appellant Diaz' first trial. Stating that he would not use that charge since "it didn't work last time," Judge Brieant told the jurors:

> I fear that perhaps your unwillingness or inability to reach a unanimous verdict on any count may stem in some part from your failure to pay attention to the instructions given by the Court.

(T.329).

Moreover, during the course of these instructions, Judge Brieant also stated that if the jurors believed the testimony of the undercover agent, "then that would warrant a conviction on Count

Three" (T.332). In summarizing the obligations the jurors owed to the administration of criminal justice, Judge Brieant told them:

> If you are satisfied beyond a reasonable doubt, it's your duty to step up and say so, and if it's not, it's your duty to step up and find a verdict of not guilty and you ought to be able to do one or the other given the evidence that's before you and using you common sense.
>
> (T.333-334).[12]

After further deliberations, the jurors found appellant Diaz guilty as charged (T.360).

D. The Sentence

During the course of the sentencing proceeding, the district court questioned the Assistant United States Attorney about the two-year delay between the crime and appellant's arrest (T.348). In the course of the discussion, the Assistant United States Attorney flatly contradicted the Government's prior representation that no photographs had been used during the investigation. The Assistant United States Attorney revealed that "there was an identification made immediately, in fact a day or two days after the incident occurred, as a result of a mug shot" (T.350).

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[12] Defense counsel objected to the supplemental charge, to which the district court responded: "You have an exception to the whole Allen charge" (T.334, 336).

ARGUMENT

Point I

THE GOVERNMENT'S FAILURE TO DISCLOSE WHETHER PRETRIAL PHOTOGRAPHIC IDENTIFICATION PROCEDURES HAD BEEN EMPLOYED TO IDENTIFY APPELLANT REQUIRES THAT A HEARING BE HELD TO DETERMINE THE QUESTION.

Prior to trial, appellant, relying on United States v. Wade, 338 U.S. 218 (1967), and related cases, requested a hearing to determine the pretrial procedures used to identify him and whether those procedures gave rise to a substantial likelihood of misidentification at trial. Because of the Assistant United States Attorney's representation that neither a line-up nor a photographic spread had been used, the district court denied the request.

However, while the record is unclear as to what specific photographic identification procedures were employed and when they occurred, it now appears that the Assistant United States Attorney's[13] previous representation that no photographs had been used was either inaccurate, misleading, or a falsehood, regarding evidence relevant to the most important issue in the case. Moreover, the Assistant United States Attorney who tried the case did not remedy the possibility of non-disclosure. In

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[13] The Assistant United States Attorney who handled the motion proceedings did not try the case.

fact, he only alluded obliquely to a purported identification procedure in which appellant's photograph had been identified by the undercover officer (T.167) as well as other police officers (T.313, 358).[14] However, the Assistant United States Attorney failed affirmatively to disclose that an identification procedure took place -- if, indeed, any did occur. Thus, defense counsel was left with the erroneous impression that the Government's prior representation remained valid. Because the record indicates that undisclosed pretrial identification procedures may have occurred here, a hearing is required to determine the question.

The Government's case depended entirely on identification testimony. The only evidence[15] of appellant's participation in the crimes charged was the New York City police officers' testimony that they had seen appellant for an extremely brief period of time on a day almost two and a half years prior to trial, and could still identify him. See Brathwaite v. Manson, 527 F.2d 363, 371-372 (2d Cir. 1975), cert. granted, 44 U.S.L.W. 3624 (May 4, 1976). As the district court said, identification

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[14] In an unresponsive answer, stricken from the record, the undercover officer testified that he had seen a picture of appellant on June 29, 1974 (T.76).

[15] While the proof which showed that the car used during the course of the crime had license plate number 699XIC and was registered to Orlando Diaz, the probative value of this testimony was totally undercut by the fact that the car registered to Orlando Diaz was a four-door sedan, while the police officers testified that the car seen on June 28, 1974, was a station wagon.

was "probably the only question in the case..." (T.171), while defense counsel told the jurors that the main issue was whether this case was a case of "mistaken identity" (T.15, 243, 250, 250, 256-257). Obviously, the knowledge that pretrial identification procedures had been employed and that photographs had been seen by those who later identified appellant at trial was critical.

Not only was this information determinative of whether a suggestive identification had taken place and whether any subsequent identification could be insulated from any prior taint, see, e.g., United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir.), cert. denied, 400 U.S. 908 (1970); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir. 1973), cert. denied, 414 U.S. 924 (1974); United States v. Reid, 517 F.2d 953, 965-967 (2d Cir. 1975), but it also was absolutely essential to the preparation of an adequate defense. Thus, the non-disclosure of any pretrial procedures precluded the defense's discovery of photographs used, see Rule 16(1)(C), Federal Rules of Criminal Procedure, as well as proper preparation for cross-examining the Government's witnesses and planning trial strategy. Cf. United States v. Durant, 545 F.2d 823 (2d Cir. 1976).

Most important, knowledge of any photographic display was extremely critical to a fair determination of the credibility of the Government's witnesses (see Napue v. Illinois, 360 U.S. 264, 269 (1959); United States v. Consolidated Laundries, 291

F.2d 563, 570 n.10 (2d Cir. 1961)) and to the jurors' ultimate determination of the awful possibility that the police had identified the wrong man. See Brathwaite v. Manson, supra, 527 F.2d at 371.

Given the explicit conflict between the Government's pretrial denial of any photographic identification procedures and the evidence in the trial record indicating that such procedures may have been employed, a hearing, limited to the question of the existence of these procedures, is required. If that hearing demonstrates that such procedures were, in fact, utilized, a new trial must be granted, since the Government's non-disclosure, even after specific request (compare United States v. Agurs, 427 U.S. 97 (1976)), precluded appellant's preparation of an adequate defense, and was so unfair as to deny him due process.[16] Ingram v. Peyton, 367 F.2d 933, 936

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[16]Of course, if the hearing reveals that photographic identification procedures were employed, a new trial is also required since the high value of the previously undisclosed evidence could not have escaped the Assistant United States Attorney's attention. United States v. Morell, 524 F.2d 550, 553 (2d Cir. 1975); United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1972); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138, 147-148 (2d Cir. 1968). Likewise, if the Assistant United States Attorney intentionally suppressed the evidence of the pretrial procedures, automatic reversal of the conviction is also required. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975); United States v. Morell, supra, 524 F.2d at 553; United States v. Kohn, supra, 472 F.2d at 287; Giglio v. United States, 405 U.S. 150 (1972); cf. Moore v. Illinois, 408 U.S. 706, 797-798 (1972); Napue v. Illinois, supra, 360 U.S. at 269; see also United States v. Miller, 411 F.2d 825, 831-832 (2d Cir. 1969); United States v. Keogh, supra, 391 F.2d at 147.

(4th Cir. 1966); cf. United States v. Durant, supra;[17] see also Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145 (1964); Giglio v. United States, 405 U.S. 150, 155 (1972); Brady v. Maryland, 373 U.S. 83, 86 (1963); Napue v Illinois, supra, 360 U.S. 264; United States v. Consolidated Laundries, supra, 291 F.2d at 571.

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[17] Durant involved an analogous situation. There, the district court improperly denied a defense request for a fingerprint expert. This Court, in granting a new trial, rejected the suggestion that remand be ordered solely for the appointment of an expert, whose report could then be considered in deciding whether to grant a new trial. In language which is as applicable to the Government's failure to disclose identification procedures -- the situation contemplated here -- as it was to the facts in Durant, this Court said that the purpose of such information "is not to supply either the trial or the appellate court with anything, but to furnish defense counsel ... information to use as he sees fit." United States v. Durant, supra, 545 F.2d at 829.

Point II

THE DISTRICT JUDGE'S SUPPLEMENTAL INSTRUCTIONS TO THE JURORS HAD THE CUMULATIVE EFFECT OF IMPERMISSIBLY PRESSURING THEM TO REACH A VERDICT.

On the second day of deliberations, the jurors announced that they were deadlocked.[18] In response, the district judge gave a supplemental charge, to which defense counsel objected. During the judge's instructions, the jurors were told that their unwillingness to reach a unanimous verdict stemmed, at least in part, from their failure to pay attention to the court's instructions; that if they believed Officer Marrero, they could find appellant guilty on Count Three; and that they ought to be able to reach a unanimous verdict, given the evidence. Because this charge was coercive and unbalanced, reversal of the judgment is required.

While a charge pursuant to Allen v. United States, 164 U.S. 492 (1896), has been accepted as a last resort,[19] close

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[18] Although defense counsel suggested that the Allen charge used at appellant's first trial be read, the district judge rejected that request, saying, "[I]t didn't work last time, did it?" (T.328).

[19] See United States v. Rodriquez, 545 F.2d 829 (2d Cir. 1976); United States v. Bermudez, 526 F.2d 89, 99-100 (2d Cir. 1975); United States v. Tyers, 487 F.2d 828, 832 (2d Cir. 1973), cert. denied, 416 U.S. 971 (1974); United States v. Martinez, 446 F.2d 118 (2d Cir.), cert. denied, 404 U.S. 944 (1971).

scrutiny of those instructions that go beyond the already approved language is required to insure that the so-called "dynamite" charge does not coerce a verdict. United States v. Amaya, 509 F.2d 8, 13 (5th Cir. 1975); United States v. Cheramie, 520 F.2d 325, 330 (5th Cir. 1975). Moreover, because of the powerful impact of this type of charge, it is essential that the instructions be completely balanced. Here, the district court's charge failed both these tests.

The district court's statement that the inability to reach a verdict resulted from the jurors' failure to pay attention to his prior instructions was coercive, since it indicated the judge's belief that an attentive juror, willing to comply with the court's instructions, should be able to reach a verdict. This was improper.

> No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence or his integrity.
>
> Powell v. United States, 297 F.2d 318, 321 (5th Cir. 1961), quoting from Kesley v. United States, 47 F.2d 453, 454 (5th Cir. 1931).

The improper effect was cemented by the judge's subsequent instruction that, given the evidence, the jurors ought to be able to render a unanimous verdict.[20] Thus, this portion of the charge impermissibly pressured the jurors into resolving factual issues

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[20] United States v. Bowles, 428 F.2d 592 (2d Cir. 1970), is distinguishable, since in that case there was no objection to the charge and, taken as a whole, the instructions were not coercive.

which they obviously found difficult to decide. As the District of Columbia Circuit, en banc, explained:

> Statements of this sort reflect the judge's assessment that the factual issues bear relatively easy resolution, and pressure jurors, who in their own endeavors have not found it so, to come to some result at all costs.
>
> United States v. Thomas, 449 F.2d 1177, 1183 (D.C. Cir. en banc 1971).

Indeed, in Powell v. United States, supra, 297 F.2d 318, instructions similar to those given here required reversal. There, the judge told the jurors "that if [they] remembered the evidence and heeded the charge of the court, [they] ought to be able to agree upon a verdict." Powell v. United States, supra, 297 F.2d at 320-321. Reversing the conviction because the instructions were coercive, the Powell court stated that the district judge's comment was "a non sequitur," since the jurors' failure to agree indicated a sharp divergence of views, and improperly reflected on the jurors' integrity.

Furthermore, the error of the district court's instructions here was magnified by that portion of the charge which indicated that if the jurors believed Officer Marrero, they could convict. This instruction, because it was not balanced by a cautionary instruction as to the difficulties of eyewitness identification, and considered in light of the other objectionable aspects of the Allen charge, unfairly simplified the jurors' factfinding task. Thus, it effectively eliminated the real possibility that Marrero was, in good faith, mistaken. Since the district court's

supplementary instructions impermissibly pressured the jurors to render a verdict, reversal is required. Powell v. United States, supra.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and a new trial ordered; in the alternative, remand for a hearing is required.

Respectfully submitted,

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